Supreme Court, U.S.
FILED
JUNE
25 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1915

In The

Supreme Court of the United States

October Term, 1986

BOHEMIAN CLUB,

Appellant,

vs.

FAIR EMPLOYMENT AND HOUSING COMMISSION, STATE OF CALIFORNIA; DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING; and MARK GUERRA, as Director,

Appellees.

On Appeal from the Court of Appeal of the State of California

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Does section 701(b) of Title VII of the Civil Rights Act of 1964, which exempts bona fide private membership clubs from Title VII, preempt state laws which regulate the discriminatory employment practices of such clubs?

2. Does the freedom of association guaranteed by the First Amendment prohibit states from regulating the discriminatory employment practices of private clubs?

3. Did the court below correctly conclude that the issues herein were legal questions subject to plenary judicial review?

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Appellees.

On Appeal from the Court of Appeal of the State of California

MOTION TO DISMISS OR AFFIRM

Appellee Fair Employment and Housing Commission, State of California (California), pursuant to Rule 16 of the Supreme Court Rules, moves to dismiss the appeal now pending herein, on the grounds that state regulation of the discriminatory employment practices of a club does not present any substantial federal question. Alternatively, California moves to affirm the opinion below, on the grounds that the federal questions presented are so unsubstantial as not to require further argument.

Furthermore, in response to appellant's suggestion that its Jurisdictional Statement be regarded as a petition for writ of certiorari, California opposes the granting of certiorari, on the grounds that the opinion below is consistent, and not in conflict, with applicable decisions of this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES

In addition to the constitutional provisions and statutes specified by appellant, this case involves Article I, Section 8, of the California Constitution, which provides:

> "A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin."

STATEMENT OF THE CASE

This case concerns sex discrimination in employment, not in membership.[1] Appellant Bohemian Club ("Club") freely acknowledges that the Club's employment practices discriminate against women, and argues only that California may not declare such discrimination unlawful.

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1. For purposes of this motion, California will not dispute appellant's characterization of its membership activities, as set forth in appellant's Statement of the Case. (Juris. Statement, pp. 4-6.) However, appellant's Statement of the Case must be supplemented so as to present the relevant facts as to the Bohemian Club's employment practices.

(Juris. Statement, p. 5; and App. A to Juris. Statement, pp. A-7, A-10-A-11, and A-21 (*Bohemian Club v. Fair Employment & Housing Com.*, 187 Cal. App.3d 1, 10, 13-14, and 22 [231 Cal.Rptr. 769] (1986)).)

The Club, a private membership club for men only, devoted to the arts, operates two facilities, and engages in discriminatory employment practices at each location. It requires that all employees at the Grove, the Club's campground near Monte Rio, California, be male, and that substantially all employees at the City Club, its facility in San Francisco, be male.[2] (App. A to Juris. Statement, p. A-3 (*Bohemian Club,* 187 Cal.App.3d, at 7-8); and App. D to Juris. Statement, pp. A-49-A-50.)

The Club employs a substantial number of workers. The Club permanently employs approximately 100 employees—90 at the City Club and 10 at the Grove. In addition, 250 men are hired to work at the Grove during the annual retreats, and the City Club staff is supplemented, as required, for various functions. (App. A to Juris. Statement, p. A-3 (*Bohemian Club,* at 7-8); and App. D to Juris. Statement, pp. A-43, and A-49-A-50.)

The Club's hiring proceedures are in no way selective. To the contrary, employees are primarily hired sight unseen, through union referrals, which are never refused, from the area around the Grove, and simply off the street. No applications are required in many City Club positions, and no applications at all were required for the Grove before the commencement of the administrative proceed-

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2. At the time of the administrative proceeding herein, only 11 out of 74 permanent City Club employees were women. (App. D to Juris. Statement, p. A-49.)

ings herein. The Club does not evaluate applicants for employment according to their ability to interrelate with members or participate in Club activities. (App. A to Juris. Statement, pp. A-3, and A-21 (*Bohemian Club,* at 8 and 22); and App. D to Juris. Statement, pp. A-50-A-51.)

Furthermore, the relationship between members and employees is "almost exclusively commercial in nature." (App. A to Juris. Statement, p. A-21 (*Bohemian Club,* at 22).) At the Grove, this relationship is "transitory and business-like." (*Ibid.*) The Club prohibits employees from fraternizing with members. (App. A to Juris. Statement, pp. A-10, and A-21 (*Bohemian Club,* at 13 and 21); and App. D to Juris. Statement, p. A-51.) As explained below, "because of the nonfraternization policy and lack of selectivity in hiring employees, such male fellowship as might exist between club members and employees is clearly in a legal sense tangential." (App. A to Juris. Statement, p. A-21 (*Bohemian Club,* at 21).)

Club members prefer male employees (App. A to Juris. Statement, p. A-20 (*Bohemian Club,* at 21)), and fear that the presence of female employees would change the environment. (Juris. Statement, p. 6.) These concerns are "mere stereotypical assumptions, lacking in any factual basis." (App. A to Juris. Statement, p. A-21 (*Bohemian Club,* at 21).) Furthermore, the Club's limited experience with female employees, both during World War II and with the one woman now permitted to work in the City Club during Club activities, indicates that the presence of female employees need not disrupt Club activities. (App. A to Juris. Statement, pp. A-11 n.6, and

A-19-A-20 (*Bohemian Club,* at 13 n.6 and 21); and App. D to Juris. Statement, p. A-52.)

The opinion below recognizes that the Club may be able "to demonstrate that male gender is a BFOQ [bona fide occupational qualification] for particular employment positions." (App. A to Juris. Statement, p. A-23 n.13 (*Bohemian Club,* at 24 n.13).) Any legitimate need to designate specific male-only jobs is thus protected. The Club was found to violate the FEHA because of its complete exclusion of female employees from the Grove and substantial exclusion of women from most City Club positions, without satisfying BFOQ standards. (App. A to Juris. Statement, pp. A-17-A-22 (*Bohemian Club,* at 18-23); and App. D to Juris. Statement, pp. A-80-A-95.)

Finally, the opinion below concludes that assuming, arguendo, the application of the FEHA to the Club's employment practices does, in any way, restrict constitutionally protected associational rights of the Club's members, "such infringement would be justified by the state's compelling interest in eradicating employment discrimination." (App. A to Juris. Statement, p. A-11 (*Bohemian Club,* at 14).)

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SUMMARY OF ARGUMENT

Unlike the two recent decisions in which this Court has analyzed First Amendment rights asserted by discriminatory private clubs, this case involves employment discrimination on the basis of sex, not sex discrimination in membership. This difference is the primary reason

why this case does not raise any substantial federal questions.

Employment relationships are inherently commercial, as they concern labor market participation and economic interactions. This is certainly true in the instant case, where the Club is non-selective in its hiring practices, except on the basis of sex, and forbids fraternization between employees and members. Under these circumstances, employment discrimination is not worthy of constitutional protection, even if Club members may enjoy a right of intimate association among members.

If California's regulation of the Club's discriminatory employment practices does infringe upon any constitutionally protected rights of Club members, such infringement is justified by the compelling interest of the state in protecting California workers against the harmful effects of employment discrimination. California has determined that employees, employers, and the general public are substantially and adversely affected when equal employment opportunity is denied. The decision below furthers California's strong interest in eliminating discriminatory employment practices.

California's commitment to eradicating employment discrimination does extend further than that of the federal government. Employers such as the Club are covered by California's law regulating discrimination in employment, but exempted from the comparable federal law. This difference is legally insignificant, since states may prohibit discriminatory employment practices which are permitted under federal law.

The California Court of Appeal properly applied the constitutional and statutory principles set forth in prior

decisions of this Court, and correctly concluded that California's regulation of the Club's discriminatory employment practices was not prohibited by federal law. Further review by this Court is therefore not necessary.

ARGUMENT

I.

CALIFORNIA'S AUTHORITY TO REGULATE DISCRIMINATORY EMPLOYMENT PRACTICES OF PRIVATE CLUBS IS NOT PREEMPTED BY TITLE VII

California's Fair Employment and Housing Act (FEHA), Cal. Gov't Code Ann. § 12900, *et seq.* (West 1980 and Supp. 1987) governs discriminatory employment practices of substantially all California employers of five or more persons. See Cal. Gov't Code Ann. § 12926(c) (West 1980 and Supp. 1987).[3] The FEHA does not exempt private clubs from its coverage, but tax-exempt, bona fide private membership clubs are exempted from the nondiscrimination requirements of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*,

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3. Section 12926(c) provides, in relevant part:

> " 'Employer,' except as hereinafter provided, includes any person regularly employing five or more persons, . . ."

"Person" is defined in the FEHA to include associations. See Cal. Gov't Code Ann. § 12925(d) (West 1980).

the principal federal law regulating employment discrimination. See § 701(b) of Title VII, 42 U.S.C. § 2000e(b).[4]

Employment discrimination by private clubs is thus not prohibited by Title VII, but is prohibited by the FEHA. The Club argues that this difference between state and federal laws presents a substantial federal question, the answer to which is fatal to California's regulation of the Club's employment practices. The Club asserts that Title VII preempts FEHA's coverage of private clubs.

The Club's appeal on this issue should be rejected because the narrow preemptive effect of Title VII has been established by this Court. As explained in a recent unanimous decision:

> "... Title VII does not itself prevent states from extending their non-discrimination laws to areas not covered by Title VII, see § 708, 78 Stat. 262, 42 U.S.C. § 2000e-7, ... Quite simply, Title VII is neutral on the subject of all employment practices it does not prohibit." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103 (1983).

Whether Title VII's preemptive scope is governed only by § 708 of Title VII, 42 U.S.C. § 2000e-7, or also by § 1104 of the Civil Rights Act of 1964, 42 U.S.C. § 2000h-4,[5]

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4. Section 701(b) provides, in relevant part:

> "The term 'employer' ... does not include ... (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, ..."

5. Section 708 is the provision the Court has primarily cited in discussing Title VII's preemptive effect. As stated in *Shaw*, 463 U.S., at 101, "Title VII expressly preserves nonconflicting state laws in its § 708 ...." See also *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 422 n.18 (1975).

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no basis exists to hold that the FEHA's coverage of private clubs is preempted. Under § 708[6] and § 1104,[7] state laws are rarely preempted by Title VII.[8] Indeed, Title

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Other decisions by this Court simply describe Title VII as supplementing, not supplanting, state laws, without citing any specific statutory provision. See *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 67 (1980), and *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48-49 (1974).

Section 1104 has also been cited on occasion. See *Shaw*, 463 U.S., at 404 n.22. However, at least one member of this Court believes that only § 708 need be considered. See *California Federal Sav. & Loan Ass'n. v. Guerra*, — U.S. — [107 S.Ct. 683, 697] (1987) (Scalia, J., concurring).

The choice between § 708 alone or §§ 708 and 1104 together need not be resolved herein, however, since, as Justice Stevens explained in similarly not reaching this issue in *California Federal*, 107 S.Ct., at 696 n.1 (Stevens, J., concurring), "[e]ven if § 1104 applies, the California statute would not be preempted in this case."

6. Section 708 provides:

> "Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be unlawful employment practice under this sub-chapter."

7. Section 1104 provides:

> "Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof."

8. The preemptive scope of Title VII is extremely narrow. As explained in *California Federal Sav. & Loan Ass'n.*:

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VII expressly preserves, rather than usurps, the authority of states to enact their own supplementary laws. The only limitation is that state laws may not permit or require employers to violate Title VII and may not be inconsistent with the purposes of Title VII. Neither of these conditions is presented in the instant case.

Section 708 obviously does not require preemption, since a state law forbidding employment discrimination by private clubs does not require or permit any violation of Title VII. Section 1104, if applicable, similarly does not preempt California's FEHA, since compliance with both state and federal law is not "a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 143 (1963), and the FEHA is not "an obstacle" to accomplishing congressional objectives. *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941). See *California Federal Sav. & Loan Ass'n. v. Guerra,* — U.S. — [107 S.Ct. 683, 689] (1987) (plurality opinion).

Furthermore, the FEHA was enacted pursuant to the police power of the state. See Cal. Gov't Code Ann.

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"In two sections of the 1964 Civil Rights Act, §§ 708 and 1104, Congress has indicated that state laws will be pre-empted only if they actually conflict with federal law.

". . . .

"Sections 708 and 1104 severely limit Title VII's pre-emptive effect." (*Id.,* 107 S.Ct at 689-690) (Marshall, J., joined by Brennan, J., Blackman, J., and O'Connor, J.)

"[Sections 708 and 1104] are more precisely *anti-pre-emption* provisions, prescribing that nothing in Title VII (in the case of § 708) and nothing in the entire Civil Rights Act (in the case of § 1104) shall be deemed to pre-empt state law unless certain conditions are met." (*Id.,* at 697) (Scalia, J., concurring.)

§ 12920 (West 1980).[9] A presumption exists against preemption of a state's exercise of its police power. See *Hillsborough County v. Automated Medical Labs.*, 471 U.S. 707, 715 (1985); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); and *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

Nothing in Title VII's language or history overcomes this presumption against preemption. Section 701(b) of Title VII is a definitional section, and the exclusion of various employers from that definition indicates nothing more than a congressional decision to exempt those employers from Title VII. For example, employers which were states and political subdivisions thereof were originally excluded by this same definition. See 78 Stat. 253 (1964).[10] These definitional exclusions clearly were not intended to preclude state regulation of employment practices found to be detrimental to the public welfare of the state.

In view of the narrow preemptive effect of Title VII, and the absence of any indication of congressional intent to overcome the presumption against usurpation of a state's exercise of its police power, the Club's argument that Title VII preempts California's FEHA must be rejected as presenting no substantial federal question.

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9. Section 12920 provides, in pertinent part, that the FEHA "shall be deemed an exercise of the police power of the state for the protection of the welfare, health, and peace of the people of this state."

10. The exclusion for states and political subdivisions thereof was eliminated in 1972. See 86 Stat. 103 (1972).

II.

THE CLUB'S DISCRIMINATORY EMPLOYMENT PRACTICES ARE NOT CONSTITUTIONALLY PROTECTED

1. Employment Discrimination May Not Be Justified By The Constitutional Guarantee of Freedom of Intimate Association

Discrimination in business or commercial situations, including employment relationships, has never been held to be constitutionally protected. As this Court proclaimed in its unanimous decision rejecting the contention that a law firm's partnership considerations were constitutionally immune from Title VII:

> " '[I]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections.' *Norwood v. Harrison,* 413 U.S. 455, 470 (1973)." *Hishon v. King & Spalding,* 467 U.S. 69, 78 (1984).

See also *Runyon v. McCrary,* 427 U.S. 160, 176 (1976); *Norwood v. Harrison,* 413 U.S. 455, 469-470 (1973); and *Railway Mail Assn. v. Corsi,* 326 U.S. 88, 93-94 (1945).

Freedom of intimate association is, of course, constitutionally guaranteed by the First Amendment, but the two recent decisions of this Court describing that guarantee explain that constitutional protection only extends to "those relaitonships, including family relationships, that presuppose 'deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life.' " *Bd. of Dirs. of Rotary Int'l v. Rotary Club,* —

U.S. — [107 S.Ct. 1940, 1946] (1987), quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 619-620 (1984).[11]

Employment relationships are, both presumptively and under the facts of this case, *not* distinctively personal.[12] As explained in *Roberts*, 468 U.S. at 620:

> "[T]he Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse that would not apply to regulations affecting the choice of one's fellow employees."

Employment practices are economic transactions in which the employer enters into a labor market and establishes contractual agreements to pay for services. By choosing to become an employer[13] and interact with a sig-

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11. The Club's constitutional immunity argument rests solely on the right of privacy and intimate association, and not on any freedom of expressive association. See App. A to Juris. Statement, p. A-11 n.7 (*Bohemian Club*, at 14 n.7).

12. Arguably, constitutional protection might extend to employment relationships which otherwise satisfy the criteria of relative smallness, high selectivity, purpose and seclusion outlined in *Rotary*, 107 S.Ct., at 1946, and *Roberts*, 468 U.S., at 620. See *Runyon v. McCrary*, 427 U.S. 160, 187-188 (1976) (Powell, J., concurring). If so, the FEHA already exempts such intimate employment relationships, excluding from coverage most employers of less than five persons. See Cal. Gov't Code § 12926(c). See also *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), where the Court held that a local regulation prohibiting two or more unrelated persons living in a single dwelling did not involve freedom of association or privacy rights because "[w]e deal with economic and social legislation," *id.*, at 8, and "the police power of the State." (*Id.*, at 4.) As set forth above in the Statement of the Case, this case involves non-selective employment practices.

13. The Club's contention that California has "forced" the Club to employ women, Juris. Statement, p. 8, is simply

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nificant portion of California's labor force, the Club makes itself a participant in California's labor market. The Club, like other employers, is therefore subject to the FEHA, and the Club's claim of constitutional immunity from regulation of its discriminatory employment practices raises no substantial federal question.

2. California Has A Compelling Interest In Eliminating Employment Discrimination

Assuming, arguendo, California's regulation of the Club's discriminatory employment practices does in any way infringe upon the Club members' constitutionally protected rights of privacy and intimate association, the regulation is nonetheless justified by California's compelling interest in eradicating employment discrimination. Freedom from employment discrimination is both a constitutional right and a civil right in California. Cal. Const., art. 1, § 8; and Cal. Gov't Code Ann. § 12921 (West 1980).

Furthermore, as stated above, the FEHA was enacted pursuant to the police power of the state, and, as Justice Douglas declared in a case upholding the authority of states to regulate private discrimination despite the lack, at that time, of federal regulation, "the police power of a State under our constitutional system is adequate for the protection of the civil rights of its citizens against discrimination . . . ." *Bob-Lo Excursion Co. v. Michigan*,

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erroneous. California obviously does not "force" the Club to hire anyone; the Club has itself decided it wishes to hire employees. All California requires is that when the Club chooses to become an employer, the Club must abide by the non-discrimination requirements of the FEHA applicable to most California employers.

333 U.S. 28, 41 (1948) (Douglas, J., concurring, with Black, J.) See also *Alfred L. Snapp & Son, Inc. v. Puerto Rico,* 458 U.S. 592, 609 (1982).

In enacting the FEHA, California determined that:

> "[T]he practice of denying employment opportunities and discriminating in employment . . . [on account of sex] foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advance, and substantially and adversely affects the interest of employees, employers, and the public in general." Cal. Gov't Code Ann. § 12920 (West 1980).

This determination demonstrates California's commitment to ridding its labor market of the damaging effects of employment discrimination.

California led the country in establishing that employment discrimination on the basis of sex is not to be tolerated. "[S]ex alone may not be used to bar a person from a vocation, profession or business." *Sail'er Inn, Inc. v. Kirby,* 5 Cal.3d 1, 8 [95 Cal. Rptr. 329; 485 P.2d 529] (1971). As further explained by the California Supreme Court:

> "The right to work and the concomitant opportunity to achieve economic security and stability are essential to the pursuit of life, liberty and happiness." *Id.* at 17.

Numerous California Supreme Court decisions attest to the importance of the FEHA "for the vindication of constitutionally recognized civil rights, . . ." *State Personnel Bd. v. Fair Employment & Housing Com.,* 39 Cal.3d 422, 432 [217 Cal. Rptr. 16, 703 P.2d 354] (1985). See also *Brown v. Superior Court,* 37 Cal.3d 477, 485 [208 Cal.

Rptr. 724, 691 P.2d 272] (1984); *Commodore Home Systems, Inc. v. Superior Court,* 32 Cal.3d 211, 220 [185 Cal. Rptr. 270, 649 P.2d 912] (1982); *Price v. Civil Service Commission,* 26 Cal.3d 257, 286 [161 Cal. Rptr. 475, 604 P.2d 1365] (1980); and *Gay Law Students Assn. v. Pacific Tel. & Tel. Co.,* 24 Cal.3d 458, 470 [156 Cal. Rptr. 14, 595 P.2d 592] (1979).

As in *Roberts,* 468 U.S., at 623, the state's "compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the [Club] may have on the male members' associational freedoms." See also *Rotary,* 107 S.Ct., at 1947. Therefore, if California's decision to regulate the discriminatory employment practices of the Club does infringe upon Club members' constitutional rights, such infringement still does not present any substantial federal question requiring another decision by this Court reaffirming the authority of a state to protect its people against the harmful effects of discrimination.

III.

THE COURT OF APPEAL PROPERLY RESOLVED THE CONSTITUTIONAL ISSUES AS QUESTIONS OF LAW

The material facts of this case are not substantially disputed; only the legal significance of most facts in question.[14] The decision below assumes that the relation-

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14. The Club has not disagreed with the factual description of its discriminatory employment practices as set forth in the decision below, and has merely deemphasized these facts and highlighted its membership activities instead. See n.1, *supra.*

ship among Club members is " 'intimate' in associational terms, [but] the same cannot be said for the associational rights of members vis a vis employees." (App. A to Juris. Statement, p. A-10 (*Bohemian Club,* at 13).) See also App. D to Juris. Statement, p. A-76. Even if the Club's own description of its membership and its activities is absolutely accurate, the Club's discriminatory employment practices are not constitutionally protected. As the court below stated after describing the Club's fear of the effect of female employees:

> "We intend no denigration of the sincerity or accuracy of such sentiments. They are, however, to be measured against the countervailing constitutional rights of persons to be free from invidious discrimination in hiring." (App. A to Juris. Statement, pp. A-19-A-20 n.12 (*Bohemian Club,* at 21 n.12).)

Because this case involves the legal significance of substantially undisputed facts, the court below stated:

> "[O]ur conclusions on the substantive issues presented in this appeal do not depend upon which standard of review should have been employed by the trial court. . . . [G]iven the state of the evidence we are able to resolve such issues as a matter of law." (App. A to Juris. Statement, p. A-7 n.3 (*Bohemian Club,* at 11 n.3).)

The question as to whether the Club's discriminatory conduct is constitutionally protected is certainly a legal question, since it requires the identification of legal principles and their application to specific facts. Even though such legal questions may be decided, in the first instance, by administrative agencies, such decisions are, of course, subject to plenary judicial review. See *F.T.C. v. Indian Federation of Dentists,* — U.S. — [106 S.Ct. 2009, 2016]

(1986). California law is to the same effect. See *Halaco Engineering Co. v. South Central Coast Regional Com.*, 42 Cal.3d 52, 74-75 [227 Cal.Rptr. 667, 720 P.2d 15)] (1986).

Because the court below correctly identified the legal issues, and decided those issues de novo in accordance with the legal principles enunciated by this Court in various recent decisions, the Club fails to raise any substantial federal question as to the scope of judicial review.

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CONCLUSION

For the reasons stated above, the appeal should be dismissed or the decision below affirmed for want of any substantial federal question. If the Court should treat the Jurisdictional Statement as a petition for writ of certiorari, the petition should be denied.

Respectfully submitted,

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DATED: June 23, 1987